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THE ALLISON SOCIETY.

During the last month the Allison Society has developed along two very important lines of growth. An increased attendance and a growing interest have been the two features most distinctly characteristic of the meetings.

While the regular order of exercises has not been abandoned, more prominence than heretofore has been given to extemporaneous speaking upon subjects assigned by the President.

Questions of parliamentary law, arising during the transaction of business, have also been discussed with a thoroughness, which has frequently prolonged the meetings far beyond the usual hour of adjournment.

The meeting on the evening of May 11th was one of exceptional importance. For some time a number of Allison men had been of opinion that some slight changes in the Constitution would be advisable, and a committee on revision had been appointed. At this meeting the committee reported several changes, which promise to be of great benefit to the society.

At the meeting of May 18th the following officers were elected:

President—Graul.
First Vice President—Adamson.
Secretary—Nicholls.
Treasurer—Lauer.
Executive Committee—Shipman, Alexander and Valentine.

Under the amended Constitution the other officers are appointed by the President.

THE DICKINSON SOCIETY.

The Dickinson Society closed the work for the school year—the most prosperous year in its history—on Friday evening, May 25th, when an able corps of officers, consisting entirely of members of the Junior class, was installed. Every member of the organization already looks forward to the work of next term, when they are all determined that even better work shall be done than has been done in the past year and years.

On the evening of April 27th the question, "Resolved, That Quay should have been seated," was ably discussed affirmatively by Messrs. Minnick and Trude, and negatively by Messrs. Hess and Rhodes. In the general debate which followed, and in which the same question was discussed, nearly all the members present participated.

The evening of Friday, May 4th, was similarly spent in the discussion of the question, "Resolved, That the United States was justified in waging the late war against Spain." Those who argued the question on this occasion were, affirma-

tively Messrs. Aubrey and Shellenberger, and negatively Messrs. Winlack and Trude.

On the Friday evening following Messrs. Rhodes and Davis argued the affirmative side of the question, "Resolved, That the South has done more for the real benefit of the negro than the North," while Messrs. Light and Osborne upheld the negative.

The program of May 18th contained a debate on the question, "Resolved, That those who can neither read nor write should be disfranchised;" discussed affirmatively by Messrs. Stauffer and F. Rhodes, and negatively by Messrs. J. Rhodes and Hess; also a violin solo by Mr. H. S. Winlack.

The following officers were installed on Friday evening, May 25th, which evening was given up entirely to that exercise:

President—J. L. Rhodes.
Vice President—C. S. Davis.
Secretary—F. H. Rhodes.
Executive Committee—W. S. Clark, C. S. Davis and F. L. Hess.
Treasurer—W. H. Trude.
District Attorney—R. K. MacConnell.
Sheriff—J. N. Minnich.
Sergeant-at-Arms—W. H. Points.
Prothonotary—W. S. Detrich.
Warden—W. T. Osborne.
Clerk of Court—W. R. Talbot.
Constable—R. H. Moon.
Register of Wills—E. A. Bowers.

WEORCAN CLUB.

The Weorcan Club held its closing meeting for this school year on May 23. Its members, realizing as they do the benefits which they have derived from its proceedings and the still greater benefits which might in the future be derived from the organization, regret exceedingly that the time has come to part. The members all look back with pleasure to the various meetings which this club has had during the year,—meetings which were not only pleasant and interesting but which were also as instructive as they could well be made.

The officers of the Club during the last administration were:

President—L. P. Coblentz.
Vice President—A. Light.
Secretary—H. W. Russell.
Critic—W. A. Valentine.

THE ANNUAL CLASS GAME.

On the seventh of May, the Juniors having issued the challenge, which was duly accepted, the annual baseball game took place between the Junior and Middle classes. It created unbounded enthusiasm but the class of '00, the victors of last year's contest, were again triumphant and their laurels are still green. The work of the two teams was very satisfactory, but few errors being made. Captain Hess, of the '00 team, was rather wild but the hits off his delivery were few and at no time was the result of the game in doubt. Russell relieved him in the eighth inning and succeeded in sustaining his reputation. Capt. Lauer saw fit to place Adamson in the box for the team of '01, and barring the opening innings he pitched a very creditable game.

The face of Dean Trickett was seen on the bleachers. The final score by innings here follows:

Middle Class.....	10	1	3	0	2	3	0	0	1	—20
Juniors.....	2	6	2	0	0	3	0	1	0	—14

DELTA CHI FRATERNITY.

Philip M. Graul, '01, of Lehighton, Carbon county, was initiated into this fraternity on Friday, May 7th.

Messrs. Mitchell, '01, and John, '00, were the delegates of the fraternity to the National Convention, held in New York City during the first week of April.

ALUMNI NOTES.

D. Edward Long, '99, spent a short time in Carlisle during the past week.

We quote the following from the *Kane Leader:*

Neil C. MacEwen, Esq., has disposed of his law practice to his brother, B. Johnston MacEwen, and will retire temporarily at least from active practice. The reason assigned is the pressing need of attention to other business and the desire to get out of office work which has proved too severe a tax upon Mr. MacEwen's health. The

inducement, too, offered by the younger brother is said to have been a factor in the deal.

We are pleased to quote the following appreciative book notice from the *Pittsburg Legal Journal:*

"THE LAW OF GUARDIANS IN PENNSYLVANIA. By WILLIAM TRICKETT, LL. D., Dean of the Dickinson School of Law. T. & J. W. Johnston & Co., Philadelphia, publishers.

"The publishers have an established reputation in getting out law books, and when a work is published by this firm the legal profession relies on its being a first-class law book. They will not be disappointed in Mr. Trickett's work on Guardians in Pennsylvania. It is an excellent book, and fully sustains the reputation of the author established by his other publications, as particularly Trickett on Liens.

"The subject of 'Guardians' is not an extensive one, but there is enough in it to fill one volume without padding or verboseness. The work contains a full quotation and citation of authorities and Acts of Assembly, with a discussion of the principles of the law and practice. In the back of the book is a complete collection of forms for all proceedings in court in relation to a guardian's business.

"The forms here given are simple and concise, very much according to the practice and desires of the Allegheny county judges and attorneys. We can unhesitatingly recommend the book."

The following is an extract from a letter by Justice Dean, of the Supreme Court, concerning Dr. Trickett's work on Guardians:

"Am especially pleased with chapter 35, on sales of land. Slovenly conducted proceedings by guardians for sale of wards' lands have so often been the cause of subsequent litigation, that I do not hesitate to express the opinion, that your perspicuous statement of the law and the method of procedure, will tend greatly to relief from future litigation. The entire book is excellent."

MOOT COURT.

WILLIAM MOWERY vs. ARTHUR DOWNES.

Tort—Damages—Proximate cause.

STATEMENT OF THE CASE.

William Mowery, the plaintiff, owns a house and lot on West street. Arthur Downes, on Feb. 1, 1900, maliciously and willfully shot a dog belonging to Mowery, which was lying in Mowery's front yard. The wounded dog ran into the open door of the plaintiff's house, knocking him down. In falling, his head struck a door, and he sustained injuries amounting to $1,000. He brings suit to recover that amount.

GRAUL and BRENNAN for the plaintiff.

1. Plaintiff must recover, for the act of defendant was a tort, and the consequences are such as are proximate under the rule of proximate cause in torts. Drake v. Kiely, 93 Pa. 495; Scott v. Shepherd, 2 W. Bl. 892; Thomas v. Winchester, 6 N. Y. 396.

KLINE and DRUMHELLER for the defendant.

1. The cause was too remote. Fairbanks v. Kerr, 70 Pa. 86; Drake v. Kiely, 93 Pa. 495; Township of W. Mahanoy v. Watson, 112 Pa. 574.

OPINION OF THE COURT.

On Feb. 1, 1900, Arthur Downes maliciously and willfully shot a dog belonging to Mowery, which was lying in the front yard of Mowery's premises, on West street. The wounded dog ran into the open door of the plaintiff's house, knocking him down. In falling, his head struck a door, and he sustained injuries amounting to one thousand dollars, to recover which this suit is now brought.

It is submitted by counsel for defendant that there is no cause of action shown, that the result was such as the defendant could not have foreseen, and that the injury sustained was not the proximate result of the act of the defendant. They therefore urge that the maxim, "*Causa proxima non remota spectatur*," applies. Ordinarily the question of what amounts to proximate cause is for the jury, but where there is an admitted and undisputed state of facts, it becomes the duty of the court to determine whether the injury was proximate or not. Mack v. Lombard, 8

C. C. R. 305; Hoag v. Railroad, 4 Norris 293; Township v. Watson, 112 Pa. 574.

According to the weight of authority, the application of this maxim to the case before us would be erroneous and unjust. It is true, there is an intervening agency between the defendant's act and the injury sustained; yet an intervening agency does not always shield a wrongdoer from responsibility when the injury flows from his wrongful act. The principle of law seems to be well settled, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though such consequences be brought about by an intervening agency, if such agency were set in motion by the primary wrongdoer. Cooley, Torts, 70; Vanderbaugh v. Truax, 4 Denio (N. Y.) 464; Wick v. Lauder, 75 Ill. 93; Wasmer v. Delaware & R. R. Co., 80 N. Y. 212; Billman v. Indianapolis R. R. Co., 76 Ind. 166; Jeffersonville, etc., R. R. Co. v. Riley, 39 Ind. 568; Drake v. Kiely, 93 Pa. 492; and the famous squib case, Scott v. Shepherd, 2 W. Bl. 892.

The case of Vanderbaugh v. Truax, *supra*, is somewhat similar to the case before us, the facts of which are, briefly, as follows: The defendant engaged in an altercation with a negro boy, and frightened him with a weapon. The boy, pursued by the defendant, fled from him, and in the course of his flight ran into the store of his employer, and, striking against a faucet of a cask of wine, caused the wine to be spilled and lost. It was held that the defendant was liable to the owner. The doctrine laid down in the case of Guither v. Swan, 19 Johnson, cited by plaintiff's counsel, is extended much beyond that which would be necessary to support the plaintiff's claim in this case. It was there held that one who ascended in a balloon, and came down upon the garden of another, was liable for the injury caused by a crowd of persons attracted to the garden by the descent of the balloon.

In another case, that of Wasmer v. Delaware R. R. Co., *supra*, the Supreme Court held that a railway company was liable for any injury done by a runaway horse, the cause of the horse's fright being the negligent manner in which the company's servants ran a locomotive through the streets of Utica. It was likewise held in the case of Bielman v. Indianapolis R. R. Co., 76 Ind. 166, that if one, by a negligent act, frightens horses, causing them to run away, he becomes liable for the injury that may result, since it is but the natural and probable consequences of his wrong. It may be foreseen that the horses being frightened would run away, and such running away may and probably would cause injury. In the case before us, was it an unnatural or improbable result that the dog, being wounded, should flee into his master's house with all possible speed, and, in this frightened and probably bleeding state, some damage would result therefrom, for example, some valuable rugs may have been destroyed? It is not necessary that he should have foreseen the nature or extent of such injury as might result. To so hold would be requiring entirely too much in the interest of the wrongdoers. Drake v. Kiely, *supra;* Hill v. Winsor, 118 Mass. 287. Our conclusion, therefore, is according to the principle laid down in the foregoing line of authority, that the injury for which a recovery is sought is not so remote from the original wrong as to defeat the right to recover for the damages flowing from said injury.

Some courts have held that where the original act was willful or *malum in se*, that the wrongdoer should be held liable for remote causes. Jeffersonville R. R. Co. v. Riley, *supra;* Forney v. Gedmaeher, 75 Mo. 113; Scheffer v. Washington City R. Co., 105 U. S. 249. This principle is also set forth in the Am. & Eng. Encyc. of Law, Vol. 16, p. 434, in the following sentence: "The true principle is, that where an act is *malum in se* or willful, the person guilty of it is liable for all the consequences, *however remote*, because the act is quasi criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended."

Being therefore of the opinion that the defendant is liable for all the injuries sustained by the plaintiff, let judgment be entered for the sum of one thousand dollars in favor of the plaintiff.

ROBERT HAYS SMITH, J.

Arthur Downes, the defendant in this case, maliciously shot a dog belonging to William Mowery, the plaintiff. The dog ran into the house, and knocked the plaintiff down. The plaintiff, in falling, sustained injuries to the extent of $1,000, for which amount he now brings action.

The single question involved in this case is, whether the act of Downes, in shooting the dog, was the proximate cause of Mowery's injuries.

This question, the facts of the case being undisputed, is for the court to decide. Township v. Watson, 112 Pa. 574, and cases there cited.

Proximate cause has been defined as follows in Hoag v. Lake Shore, etc., R. R. Co., 85 Pa. 293, by Paxson, J. * * * "The true rule is, that the injury must be the natural and probable consequence of the defendant's negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." Substantially the same definition will be found in Milwaukee, etc., R. R. Co. v. Kellogg, 94 U. S. 469; 2 Thompson on Negligence, 1085; Pollock on Torts, 36; and in the reports of nearly all the States in the Union.

Do Downes' act and Mowery's injury bear such a relation to one another that, in the light of the above rule, the act may be held to be the proximate cause of the injury?

Downes shot the dog. When an ordinarily reasonable man shoots a dog, it is within his contemplation that he may wound, instead of kill, the animal. When wounded, and capable of running, animals become terrorized, and run about wildly. Downes must be held to have contemplated this.

Did Downes contemplate injury to a human being? It is within the knowledge and contemplation of ordinarily reasonable men that a terrorized animal loses its tractability and regard for people or things, and that it will blindly collide with objects or human beings, to their evident risk of injury. Downes must be held to have contemplated injury to persons, and consequently the injury to Mowery.

We hold that Downes' act was the proximate cause of Mowery's injury; and since there is no dispute as to the amount of damage, we direct the jury to find for the plaintiff in the sum of $1,000.

LENTZ, J.

OPINION OF SUPREME COURT.

The shooting of the dog by Downes was "willful and malicious." That the dog, thus shot, ran into the house, and, in doing so, knocked down the plaintiff, and that the plaintiff, in consequence, has suffered a severe injury, are not remarkable and peculiar. It is not necessary that the particular result should have been foreseeable, or even that it should have seemed likely that some event of the narrow class to which it belongs would happen. The case of Isham v. Dow, 70 Vt. 588, is sufficiently similar to this, and the doctrine of it sufficiently fortified by reason and authority to justify the decision reached by the learned court below.

Judgment affirmed.

ANNIE SHELLY vs. BOROUGH OF CARLISLE.

Trespass.

STATEMENT OF THE CASE.

The defendant passed an ordinance providing that no horse, mule or other beast should be driven faster than an ordinary gait in the streets of the borough. The husband of the plaintiff drove his fire-engine on a run through the streets, and ran against an obstruction in the street, which had been put there by the borough authorities, and was not lighted or guarded in any manner. The fireman was thrown off and killed. The borough owned the fire department, and had taken out accident policies for the firemen. The company paid for Shelly's death $1,000, which was paid to the plaintiff. She brings this action for $5,000 for damages sustained on account of the death.

HOLCOMB and ELMES, attorneys for the plaintiff.

1. A master is liable to his servant for injuries happening in the course of his employment. 25 N. Y. 565; 187 Pa. 287.

2. A town is liable for the acts of its agents in not keeping the street clear. 172 Pa. 408.

L. FLOYD HESS, attorney for the defendant.

1. City acted in governmental capacity, and, as such, has immunity from damages caused by negligence of agent. Freeman v. City, 7. W. N. C. 45; Hofford v. City, 16 Gray 297; Elliott v. City, 7 Phila. 128; Davis v. Corry, 154 Pa. 602; Borough v. Apple, 35 Pa. 284; Alcorn v. City, 44 Pa. 348.

2. As an agent, defendant was affected with notice of the obstacle which his principal had; and it was negligence *per se* to take that road. As to notice see Danville B. Com. v. Pomeroy, 15 Pa. 151. As to negligence see Hoven v. Pitts. & All. B. Co., 151 Pa. 620; Shaw v. Phila., 159 Pa. 487; Wellman v. Boro. of S. Depot, 167 Pa. 239.

3. As a servant, he accepted the risks of his employment. Patterson v. Pittsburg R. R. Co., 76 Pa. 393; Sykes v. Parker, 11 W. N. 494; Payne v. Reese, 12 W. N. 97.

4. If husband could not recover, neither can the wife. If this policy was accepted as a consideration for release, she is barred. Hill v. Pa. R. R. Co., 178 Pa. 223; Lancaster v. Kissinger, 1 W. N. 157.

5. A corporation, like a natural person, is responsible only for the effects which an ordinary person could foresee. Eisenbrey v. City, 24 W. N. 231; Morrison v. Davis, 20 Pa. 170; Hunter v. Wanamaker, 17 W. N. 232; Schaefer v. Jackson, 150 Pa. 149.

6. There is no evidence as to the nature of the obstacle, or that a person would be damaged if traveling at an ordinary gait. Therefore, the borough's liability is measured by the extent of the ordinance, and the plaintiff's exceeding that is contributory negligence, of which the slightest amount will bar. Campbell v. City of York, 172 Pa. 208; Davis v. Corry, 154 Pa. 600; Mathmire v. Erie City, 144 Pa. 14; Oil City Co. v. Boundy, 122 Pa. 449; Morristown v. Moyer, 167 Pa. 355.

OPINION OF THE COURT.

The question for our decision, suggested by the facts before us, is whether or not a municipality may be held liable in damages for the death of one of its employees of one of its departments, sustained while in the discharge of his duties, and caused by negligence in another department.

The cases heretofore adjudicated, bearing upon this point, leading among which is Freeman v. Philadelphia, 7 W. N. C. 45, establish it to be the law that a fire department, owned and controlled as in this case by the municipality, is a part of the municipal machinery. To quote from the case cited, *supra*, "Municipal corporations, to the extent that they are authorized or directed to exercise public governmental powers and to perform public governmental duties solely for the general good, are governmental agencies, and are entitled to immunity in respect to the acts of their subordinate officers or agents. * * * * The municipal corporation is but the representative of the State or of the public, and the officers or individuals employed are not the employees of the corporation, but are public officers exercising acts for the common good." The Borough of Carlisle, then, in the case at bar, acted in a governmental capacity in its employment of Shelly in the fire department, and he, in accepting that employment, must be assumed to have accepted also the risks incident to his duties. The borough is therefore immune from responsibility in damages to the plaintiff, because of the death of her husband, caused by the negligence or otherwise of the borough's agents. We may, in reason, go a step farther than did the court in the case cited and say, that it matters not that the injury or consequences of the negligence of its servants in one department were visited upon one engaged in another department of city government, the same principle of the municipality's immunity still obtains. The fire department exists as a part of the municipality, not for the immediate benefit of that municipality, but for the common good of the community at large. Shelly's service was therefore rendered rather to humanity than to the municipal corporation—the Borough of Carlisle.

The fact that the borough provided and paid the premiums on a $1,000 life insurance policy for each one of its employees in the fire department, and that in this case the amount of said policy on Shelly's life was paid to the plaintiff, cannot be construed to be a confession of the borough's responsibility for injury or death sustained by its firemen while in discharge of duty; nor can it be interpreted to be a waiver of the immunity secured to it by the decisions of the courts. The provision for these policies was rather made, in contemplation of the great danger which a fireman must frequently face, to act as an incentive to volunteers, and to cause men to enlist their services and accept the risks attendant upon the duties of fireman.

From the mere statement that Shelly "drove his fire engine on a run through the streets," even though in violation of one of the ordinances of the borough, there is not sufficient ground to warrant our decision or the sending to the jury the question of contributory negligence. This we therefore dismiss.

Upon all of the facts of the case, and the law thereto applied, we decide that there is no legal responsibility upon the part of the Borough of Carlisle, and a recovery by the widow is therefore denied.

By the court.

A. F. JOHN, J.

The counsel for defendant argued that the city acted in a governmental capacity, and as such has immunity from damages caused by negligence of agent.

In this I think he was right. Municipal corporations, to the extent that they are authorized or directed to exercise public governmental powers, and perform governmental agencies, are entitled to immunity in respect to the acts of their subordinate officers or agents, they being auxiliaries of the government.

In Freeman v. City of Phila., 7 W. N. 45, it was held that the city acted in a governmental capacity, and was not responsible for the negligent acts of firemen, but the injured party was compelled to bring the action against the fireman himself. In the next place the ordinance provides that there shall be no traveling within the borough limits faster than an ordinary gait. The meaning of ordinary gait is to be derived from the average rate of travel within the city streets, and it is fair to suppose that it does not mean the rate of speed employed by the fireman at the time of the accident. As was said in Davis v. Corry, 154 Pa. 600, cited by the defendant, that every essential element must be made out by the plaintiff ere he can recover, and to establish negligence upon the part of the borough authorities it is essential that the obstacle be shown to be such an one as was dangerous to life or limb of the traveling public while traveling at an ordinary gait. Or, at least, that in the minds of reasonable men, it was such an obstacle as to be a menace to the public safety. A corporation, like a natural person, is only liable for the effects which an ordinary person could foresee. Hunter v. Wanamaker, 17 W. N. 232; Shaefer v. Jackson, 150 Pa. 149. This the plaintiff failed to do. I think that the effect of this borough ordinance was to limit the responsibility of the borough to accidents occurring while traveling at an ordinary gait. To hold otherwise would be to declare that the ordinance was of no effect, and that the law-breaker could take advantage of his own recklessness and recover. While it may work a hardship in this particular instance, until the plaintiff makes out that this obstacle was dangerous at an ordinary rate of speed, he cannot recover. This ordinance acted as a guard just the same as any railing would; and it would not be contended that had there been guards around the obstacle the plaintiff could recover. There are many obstacles in the city streets and elsewhere that are free from accidents only because there has been legislation concerning them, which, to break, was in effect to be guilty of contributory negligence. For these reasons I am of the opinion that the plaintiff cannot recover.

L. L. FRANK, J.

JOHN SMITH vs. N. Y. LIFE INSURANCE CO.

Insurance policy—Wagering transaction.

STATEMENT OF THE CASE.

On Jan. 1, 1895, Mr. Jones took out a policy of life insurance for five thousand dollars ($5,000) in the defendant company. In this policy John Smith was made the beneficiary. Smith lent Jones the money with which to pay premiums until Jan. 1, 1898. On Jan. 10, 1898, Jones died under suspicious circumstances. Smith was indicted for murder and found guilty. His case is now before the Supreme Court on appeal. He now brings this suit to recover the insurance.

PIPER and TRUDE for the plaintiff.

1. When a person effects an insurance on his life, and in the policy designates another as payee of the sum, the latter can maintain an action on the policy without showing an insurable interest in the life. Scott v. Dickson Adms., 16 W. N. C. 181; Fohner's Appeal, 87 Pa. 133; Cunningham v. Smith's Admr., 70 Pa. 450.

2. A person may receive money due him

on the death of a person, notwithstanding the fact that he caused the death of such person. Carpenter's Appeal, 170 Pa. 203.

EDWARDS and DEEBLE for the defendant.

1. A man cannot be made a beneficiary in an insurance policy unless he has an insurable interest. To have an insurable interest he must be a creditor or a relative. Shafer v. Spangler, 144 Pa. 223; Ulrich v. Reinoehl, 143 Pa. 238; Corson v. McLean, 113 Pa. 438.

OPINION OF THE COURT.

The question is whether or not the beneficiary in this case was a creditor of the insured so as to establish an insurable interest in the said John Smith, or whether the policy was a mere wager.

In this case Jones took out the policy on his life for $5,000 in the defendant company, in which John Smith was made beneficiary. Smith lent Jones the money with which to pay the premiums until January 1, 1898. The beneficiary bore no relation, either lineal or collateral, to the insured so as to give him an insurable interest in the life of the deceased. Neither did he bear to the insured the relation of debtor and creditor. When Jones took out the policy on his life, Smith lent him the money with which to pay the premiums for three years, and after that period of time it seems that the insured was to pay the premiums himself. This precludes still more clearly the relation of a creditor to the insured, than if he had undertaken to pay the premiums on the policy at all times.

The three years had expired nine days previous to the death of the insured, and after the three years had expired the premiums for the ensuing years would have had to be paid by some person, and as the facts clearly state that Smith lent the money for only three years, we must presume that after the three years had elapsed Jones was to pay the premiums; and if he had not, the policy would have expired, and there would have been no right of action against the insurance company.

The facts of this case leave us in quite a disagreeable position, as they do not state either the age of the insured, or the amount of money which he paid yearly for premiums; but we think that it is fair to presume, in the absence of anything to the contrary, that he was a middle aged man, which, in our judgment, would be from thirty to thirty-five years of age. His being of that age would lessen the amount that he would be compelled to pay yearly for premiums if he were an older man; and if he was of that age, the amount that the beneficiary would be compelled to pay for the three years for premiums would not exceed in our opinion $300 or $400. And we must remember that the beneficiary lent the money only for three payments, and after that time the insured was compelled to pay the premiums himself. And again, we must note that at the time the policy was taken out there was no pre-existing indebtedness between the insured and beneficiary.

Now, the law is well settled that a creditor has an insurable interest in the life of a debtor, and may lawfully take out a policy in such sum as may reasonably secure his debt, but not in such gross disproportion to the amount of his debt that it may lead to evil results; for a policy taken out by one who has no interest, either as a creditor or a relative, in the life of the assured, is always a danger-signal. Now, we must consider whether the disproportion between the amount of the debt and the amount of the insurance policy is so great as to make it a wagering policy.

In Ulrich v. Reinoehl, 143 Pa. 238, it was held that where a policy of $3,000 was taken out to cover a debt of $110, it was a wagering policy, the disproportion between the two sums being so great as to require the judges to say, as a matter of law, that the transaction was a wager, and that the assignor of the policy had no right to retain more of the insurance money than to pay the premiums plus the interest. Now, after considering all the facts of this case, and considering the difference in amount between the debt and the amount of the policy, and considering the fact that the beneficiary would not be compelled to pay more than the three premiums, we think that it is clearly a wagering policy. The disproportion between the debt and the policy is so great as to make it clearly a wagering policy, and therefore we are of the opinion that the plaintiff cannot recover.

L. L. FRANK, J.

The question involved in this case is, whether this policy falls within that class known as speculating and wagering. If so, the plaintiff's claim is untenable. That a policy of this nature may be enforced against the company, certain relations must exist as between the insured and beneficiary. The beneficiary, it seems, must have an interest, as relative or creditor, in the life of the insured. Did Smith have an interest as such in the life of Jones? Jones took out this policy for $5,000, and made Smith the beneficiary. Smith lent Jones the money to pay the premiums for three years, from the issuing of the policy on Jan. 1, 1895, until Jan. 1, 1898. Jones died on Jan. 10, 1898. It does not appear that Jones was indebted to Smith prior to the taking out of the policy, nor does it appear that he was a relative of Smith. We are unable to see how Smith, from the statement of facts, could have an insurable interest in the life of Jones. Nor are we of opinion that the mere loaning of the money to Jones for the payment of the assessments for three years established the relation of debtor and creditor so as to create an insurable interest in Jones' life. We have seen that he had no such interest as relative; and also, that there was no prior indebtedness when the policy was taken out. From those facts alone the policy might be termed a mere wager, and therefore void. Even if the amount of the premiums paid be considered as a debt, the policy being to secure that debt, the plaintiff cannot recover, the disproportion of the debt to the amount of the insurance being so great as to make it a wagering policy, and such policy being void in law, the verdict would have to be for the defendant. We are unable to ascertain the exact amount of the premiums. It depends entirely upon the age of the insured. Assuming that he was a middle-aged man, in our estimation the premiums for three years would not exceed $400, and probably not that much. It does not appear that Smith intended paying for future premiums, had Jones not died, so the whole amount of the premiums was paid. According to the rule as laid down in Ulrich v. Reinoehl, 143 Pa. 238, this is clearly a wagering policy. Also in Shaffer v. Spangler, 144 Pa. 223, where the policies were taken out bona fide, and to secure a pre-existing indebtedness. There was no indebtedness at the time Jones took out this policy, and it seems as though, in the words of Chief Justice Paxson, in Grant v. Kline, 115 Pa. 618, "care must be taken also that a debt shall not be collusively contracted for the *mere purpose* of creating an insurable interest." We are inclined to think that such was the purpose in this case; nor can we see how in any way this was a bona fide transaction.

In Gilbert v Moose, 104 Pa. 76, where Moose insured his life, making Jacobs the beneficiary, who had no insurable interest, and who subsequently assigned the policy to Gilbert, who likewise had no insurable interest, and having paid certain assessments was recognized by the company as assignee, and upon the death of the insured collected the sum insured from the company, it was held that the administrator of the insured was entitled to recover the insurance less assessments paid by the assignee. We can decide this case upon analogous principles. The elements necessary to constitute it a valid policy are wanting. Instead of Smith having an interest in the life of Jones, the presumption in this case is inverted, and that he had an interest in his death rather than in his preservation, which no doubt in this case resulted in murder. Clearly this policy is a wager. We fail to discover anything in this transaction to support the plaintiff's claim.

Judgment is therefore entered in favor of the defendant.

NOAH M. FRANTZ, J.

OPINION OF THE SUPREME COURT.

Although it is decided that one can validly take an insurance on his own life, and make the money payable to another—1 Biddle, Insurance, 189—it is held in Pennsylvania that if the insurance is taken out at the instance of the person named as beneficiary, and with a view to speculation, it is so far void that the money, if paid by the insurer, can be recovered by the administrator of the insured—Kohr v. Wolff, 16 W. N. C. 189; Meily v. Hershberger, 16 W. N. C. 186; and that the company, when sued, can successfully defend

the action. U. B. Mutual Aid Society v. McDonald, 122 Pa. 324.

Smith was related in no way to Jones. Nor had he any other interest in the prolongation of Jones' life that would be the basis of an insurance of it. Had Jones been indebted to him, and had the debt with the interest that would probably accumulate upon it during Jones' life, and the premiums that would probably have to be paid during that life in order to maintain the policy, borne some proximate equality to the amount of the policy, there would have been interest enough to repel the suspicion of speculativeness in the transaction. No such debt existed. The amount of the first premium was lent to Jones by Smith, in order that he might take out the insurance. But, a debt cannot be created in order to sustain a policy payable to the lenders. Besides, the ratio of the policy, $5,000, to the first premium is so great as to preclude any other inference than that the beneficiary was speculating in the life of Jones. Ulrich v. Reinoehl, 143 Pa. 238; Shaffer v. Spangler, 144 Pa. 223; Cammack v. Lewis, 15 Wall. 643; Corson's Appeal, 113 Pa. 438; *Cf.* U. B. Mutual Aid Society v. McDonald, 122 Pa. 324; McHale v. McDonnell, 175 Pa. 632; Grant v. Kline, 115 Pa. 618.

It does not appear that there was any contract which bound Smith to pay the other premiums. The subsequent payment of them can have no influence on the validity of the policy, for debts arising after the policy is issued cannot retroact upon it.

Had Smith lent the amount of the first premium, and taken an assignment of the policy as collateral security for its repayment, or even had he been named as beneficiary in the policy with the understanding that, having collected the money due on it and repaid himself, he was to pay the residue over to Jones' administrator, the policy would doubtless have been valid. Such does not appear to have been the object or understanding of the parties. It was their intention that Smith should unconditionally own the policy.

The facts exhibited to the learned Court of Common Pleas warranted it in holding, as matter of law, that the insurance was a speculation upon the life of Jones, and that the company could not be compelled to pay the money named in the policy to the plaintiff.

Judgment affirmed.

HARRY HOLMES vs. JOHN TRESCOTT.

Ejectment—Renewal clause.

STATEMENT OF THE CASE.

Trescott leased a store in Carlisle to Holmes for the period of five years, with the right in Holmes to a renewal of the lease for a second period of five years. The first five years expired, and Holmes made no demand for a renewal. Trescott thereupon, in the absence of Holmes, who, a month after the close of the five years, had gone to Philadelphia to make purchase of goods, entered, and subsequently refused to allow Holmes to take possession. Ejectment.

KOSTENBADER for the plaintiff.

1. One has a right to elect whether he will sue for damages or for specific performance, if landlord refuses to grant renewal, as per contract. Arno v. Alexander, 44 Mo. 25; Rutgers v. Hunter, 6 Johns. 215.

2. The undoing of lease implies renewal for at least another term. Creighton v. McKee, 7 Phila. 324.

POINTS and CONRY for the defendant.

1. Landlord may enter in possession, and may use reasonable force to secure possession. 1 W. & S. 90; 121 Mass. 309.

2. Tenant turned out at expiration of time cannot maintain ejectment. 135 Pa 418; 8 C. & P. 134; 2 Brews. 365.

OPINION OF THE COURT.

In order to determine the rights of the parties in this case, inquiry must be had into the nature of the tenancy. Holmes leased the store for five years, with the right of renewal. He failed to exercise that right. The mere silence of Trescott in not demanding possession after the expiration of the lease is not an act in itself which would imply a renewal. Chief Justice Gibson, in Logan v. Herron, 8 S. & R. 467, says: "That the mere silence or laches of the landlord in not demanding possession at the expiration of the lease, or at any time afterwards, cannot authorize the court to draw a conclusion of acquiescence as a matter of legal inference." There must be some positive act or acts on the part of the landlord indica-

tive of and from which a renewal may be implied. Holmes is clearly a tenant at sufferance, and as such a trespasser or mere tort-feasor.

"Where a lease expires at a fixed date, the tenant holding over is strictly a tenant at sufferance, though the lessor has the option to treat him either as a trespasser or as a tenant from year to year." Hemphill v. Flynn, 2 Pa. 144; Williams v. Laden, 171 Pa. 169. The law is well settled that a tenant at sufferance is a mere trespasser, and as such the landlord may oust or eject him at his pleasure and desire. As a trespasser, Holmes has no standing whatever in this court.

Judgment is therefore given for the defendant.

N. M. FRANTZ, P. J.

DISSENTING OPINION.

Where the lease is for any indefinite period, notice is necessary to terminate the demise. Where the lease is for a definite period, notice is not necessary, as the tenant knows as well as the landlord when his time expires, consequently the law presumes he will carry out the terms of the lease.

The question in this case is whether the lease is for a definite or an indefinite period. If the lease is indefinite, then it comes under the statute of Dec. 14, 1863. If it is definite, then it does not come under the statute of 1863. If the lease in this case is definite, then the lessee may be considered by the landlord as either a tenant from year to year, or a tenant at sufferance immediately upon his remaining over at the expiration of the lease. In case he would be a tenant at sufferance, why, he could not maintain an action of ejectment against his landlord after he is in possession, as in this case.

The case before us is similar to the case of Quinn v. McCarty, 81 Pa. 475. In that case the plaintiff had leased the property in dispute to the defendant for the term of one year, with the privilege of an extension for five years, provided the terms of the lease should be complied with throughout that period. It was said in this case, and also in Brown's Appeal, 66 Pa. 155, that the Act of Dec. 14, 1863, was designed to afford an ample and complete system for the settlement of all controversies of this kind. In the case before us the lease was for a period of five years, with the privilege of renewing it for another period of five years. If the above mentioned cases come within the statute, then the case before us also falls within the statute.

Now, then, having it within the statute, we will see what effect it has upon it. The statute declares that notice must be given three months previous to the expiration of the lease. In 54 Pa. 86, Rich v. Keyser, Judge Woodward says: "Both the scope and tenor of the enactment, and the grammatical construction of the sentence, demand a three months' notice previous to the expiration of the term."

In the case before us the lessor neglected to serve notice. This, then, is sufficient according to all cases that have been decided under the statute, to enable the lessee to remain in possession of the premises.

Had the lessor notified the lessee to vacate the premises, as he should have done, then the lessee could have taken advantage of the right granted in the lease to renew it for another period of five years. The landlord's silence in regard to serving notice may have been taken by the lessee as an assent to a renewal of the lease. Anyway, the Act seems to show that the Legislature contemplated a re-possession immediately at the end of the term. The law implies an assent on the part of the landlord to renew the lease by reason of his silence, from the day he should have served notice to quit to the time he entered upon the premises, one month after the expiration of the term of the lease.

Had there been no stipulation in the lease for right of renewal, then the lease would have been definite, and the lessee would have been obliged to vacate the premises at the expiration of the term, without having notice served upon him. Such is the ruling in Williams v. Laden, 171 Pa. 369. In that case the lease was for a definite period, while in this case the lease is for an indefinite period.

H. J. SHELLENBERGER, J.

WM. EVANS vs. JOHN MAURY.

Agency—Promissory note.

STATEMENT OF THE CASE.

Maury, owning two horses which he desired to sell, told Evans of this fact, and asked him to sell them for him, if he got a chance. Evans hearing that William Simpson wanted two horses, saw Simpson, who agreed to take them at $400 if three months' credit was given. Evans reported the facts to Maury, who thanked him and told him to make the sale, and take a note at three months. Simpson drew the note payable to Evans, and, an objection being made to it, demurred to making another, saying that the one made would answer all purposes. Evans then accepted the note, and, telling Maury all the facts, handed the note to him, after endorsing it, in order to make it collectable or negotiable by Maury. Maury afterwards sold the note for $400 to one Hooper, who demanded and obtained payment from Evans, on Simpson's failure to pay it. Assumpsit by Evans to compel Maury to reimburse him.

ELDER and GRAUL for the plaintiff.

1. Agent is entitled to reimbursement from principal for advances made and expenses incurred in effectuating purpose of his employment. Am. & Eng. Encyc. of Law, 2nd Ed., 1117; Martland v. Martin, 86 Pa. 120; Griswold v. Gibbie, 126 Pa. 353.

2. Principal must promptly disavow acts transcending authority, or remain liable. Buden v. Duenny, 14 S. & R. 27; Wright v. Burbank, 64 Pa. 247; Mundorff v. Wickersham, 63 Pa. 87.

RHODES and BARR for the defendant.

1. Plaintiff had no authority to take note payable to himself, and he must adhere strictly to instructions. Wilson v. Wilson, 26 Pa. 393; Kroeger v. Pitcairn, 101 Pa. 311; Opie v. Senill, 6 W. & S. 264.

2. Agent is responsible for all acts unauthorized by principal. McCullock v. McKee, 16 Pa. 289.

3. It is a question for the jury whether the defendant ratified the action by taking the note. Bank v. Bank, 165 Pa. 500; Schrock v. McKnight, 84 Pa. 26.

OPINION OF THE COURT.

I. Whether Evans was authorized to take a note in his own name or not, does not clearly appear. The direction of Maury was simply "to make the sale, and take a note at three months." Assuming, however, that Evans overstepped the bounds of the authority originally conferred upon him, it would seem that Maury ratified his act. The question of implied ratification, it must be granted, is commonly one which should be submitted to the jury. Schrock v. McKnight, 84 Pa. 26; Bank v. Bank, 165 Pa. 500. But in the case at bar the acceptance of the note by the principal is proof absolute that he gave his approval to his agent's act. "No rule of law is more firmly established than the rule, that if one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be had he negotiated it himself." Huffcut on Agency, p. 33. See also Wheeler & Co. v. Aughey, 144 Pa. 398; Hyatt v. Clark, 118 N. Y. 563; Strasser v. Conklin, 54 Wis. 102. The request of defendant that the question of ratification be submitted to the jury must be denied.

II. That an agent is entitled to indemnity against the consequences of all acts performed in the execution of his authority is a proposition based upon sound principle and abundant authority. D'Arcy v. Lyle, 5 Binney (Pa.) 441; Huffcut on Agency, p. 80, and cases there cited. Its application to the case before us is obvious. Evans, in the execution of his authority, and strictly within its bounds, took a note in his own name which was given for the price of Maury's horses. In order that Maury might negotiate or collect the note, it was necessary that Evans endorse it, and he did so. Then, when the note fell due and was not paid by the maker, it was necessary for Evans, as first endorser, to take it up. This he did also, and being unable to collect from the maker, he seeks reimbursement or indemnity for his loss from his principal. His claim is manifestly a just one, and we are of the opinion that he should be permitted to recover. He was never a beneficial holder of the note; he had no interest in the consideration for it; and his endorsement, as between him and Maury, did not involve a contract of suretyship, but was merely for the purpose of passing the nominal ownership of the paper. It is true that Evans

might have added the words "without recourse" to his endorsement, or made a special agreement with Maury for his protection. But, under the circumstances, we think an agreement of that nature is implied. Abraham v. Mitchell, 112 Pa. 230.

Judgment for plaintiff.

JNO. BOWMAN vs. ADAM HARPER.

Mortgage—Sci. fa.—Sheriff's sale.

STATEMENT OF THE CASE.

On John Ames' land was a mortgage to Wm. Jacobs for $2,500, and a second mortgage for $1,250 to John Bowman. Ames sold to Harper the land for $5,000, receiving $1,250 in cash, Harper undertaking to pay the mortgages which were collateral to judgments held by its mortgagees John Bowman left for Australia, intending to be absent for one year. Three months after his departure Harper caused Jacobs to issue a *sci. fa.* Judgment was confessed by Ames, and a sheriff's sale of the premises had, at which Harper became the purchaser, paying $2,600. When Bowman returned, finding that Harper denied that he was under any duty to pay the $1,250, he issued a *sci. fa.* upon the mortgage.

HOLCOMB and LAVENS for the plaintiff.

1. Person may sue on promise for his benefit if consideration passes, even though not made to him personally. Hoff's Appeal, 12 Harris 200; Townsend v. Long, 27 P. F. Smith 143.

2. When realty is conveyed expressly subject to mortgage recited in conveyance, it becomes personal debt of lender. 88 Pa. 450; 90 Pa. 78; 160 Pa. 330.

MEARKLE and FRANTZ for the defendant.

1. A sale on first mortgage divests all subsequent. 1 P. & L. Dig. 1585, Act of 1887.

2. Action should be in equity. Kennedy v. Borie, 166 Pa. 360; Merriman v. More, 90 Pa. 78.

3. Agreement to pay mortgages was act and agreement between parties to indemnify against loss. Moore's Appeal, 88 Pa. 450; Merriman v. More, 90 Pa. 78.

OPINION OF THE COURT.

Harper bought the land of Ames for $5,000, paying to Ames but $1,250, and undertaking to pay the rest to the two mortgagees, who held judgments to which the mortgages were collateral. In the absence of Bowman, the second mortgagee, Harper induced Jacobs, the first mortgagee, to foreclose his mortgage, and, at the sheriff's sale, became the purchaser for $2,600, but $100 more than Jacobs' mortgage.

A sale on a first lien ordinarily divests all later liens, and the Bowman mortgage would normally be extinguished by the sale on the Jacobs mortgage. If, under the existing circumstances, it is extinguished, the consequence will be that Ames will be liable on the judgment against him to Bowman, in spite of Harper's undertaking to discharge the debt, or Harper, if liable at all, will be liable on some *quasi-contract*. To discharge him would be grossly inequitable. Nor is any advantage to be derived from resorting to a *quasi-contract*. If the only remedy is on such feigned contract, time must elapse before a judgment can be recovered upon it. In the interval, it would be possible for Harper to convey away the land, and so deprive Ames of the security which his contract contemplated. We are of opinion, therefore, that in contriving to procure a discharge of the second mortgage without paying it, Harper was endeavoring to procure a result which is inconsistent with his duty towards Ames.

But we think Harper owed a duty to Bowman, not to resort to any trick or contrivance to procure a divestiture of the Bowman judgment. His duty was to pay it, not to evade it. He was wanting in that good faith which the law imposes upon him the duty to practice. Kennedy v. Borie, 166 Pa. 360; DuPlaine's Appeal, 185 Pa. 332. The only effectual method of circumventing the attempted evasion is to hold the second mortgage undivested. It logically follows that a *scire facias* may be maintained upon it. Ashmead v. McArthur, 67 Pa. 326; Jermon v. Lyon, 81 Pa. 107.

Your verdict, therefore, gentlemen of the jury, will be for the plaintiff for $1,250, with interest.

SARAH RUDOLPH vs. SAMUEL SMOCK.

Resulting trust.

STATEMENT OF THE CASE.

Sarah Rudolph, employing her husband to obtain a tract of land for her, gave him $4,000 with which to make payment. The payment was made, and without her knowledge the deed was made to John Rudolph, the husband, and put on record. Seven years afterwards, a creditor of John Rudolph obtained a judgment against him and caused a sheriff's sale of the land, Smock becoming the purchaser. John and Sarah Rudolph had been in possession of the farm from the time of its purchase. During a temporary absence from the county of the Rudolphs, Smock took possession. Ejectment.

COBLENTZ and GERY for the plaintiff.

If a wife furnishes the purchase money with which the husband buys land and takes the deed in his own name without her knowledge, there will be a resulting trust in favor of the wife.—Kline's Appeal, 39 Pa. 463; Fillmans v. Davies, 31 Pa. 429; Peifer v. Lytle, 38 Pa. 386; Rupp's Appeal, 100 Pa. 531; Heath v. Slocum, 115 Pa. 549. The five year statute of limitation did not run against the wife for she was in possession of the land.—Clark v. Trindle, 52 Pa. 492; Williard v. Williard, 56 Pa. 119; Smith v. Tome, 68 Pa. 158.

BASHORE and CLIPPINGER for the defendant.

Smock must have had notice before a resulting trust is established.—Fillman v. Divers, 31 Pa. 429; Miller v. Baker, 160 Pa. 172; Miller v. Baker, 166 Pa. 414; Mulley v. Shoemaker, 180 Pa. 585; Olinger v. Shultz, 183 Pa. 469. The defendant was a bona fide purchaser for value without notice.—Act of April 22, 1856, 1 P. & L. 532, Sec. 6. Christy v. Sill, 95 Pa. 380; Rupp's Appeal, 100 Pa. 531; Miller v. Baker, 160 Pa. 172.

OPINION OF THE COURT.

When the deed was made to John Rudolph, he became a trustee of the land for his wife, who furnished him the purchase money, and for whom he obtained the conveyance. How his name came to be inserted as grantee in the deed does not appear, nor is it material. It might have been by the scrivener's or the grantor's mistake. It might have been by the direction of Rudolph himself, and his design might have been, as respects his wife, innocent and honorable, or otherwise. The bare fact that he undertook, with his wife's money, to buy the land for her, affects his legal title with a resulting trust for her.—Lloyd v. Woods, 176 Pa. 63.

A resulting trust can be asserted not only against the trustee, but also against a judgment creditor of the trustee.—Sill v. Swackhammer, 103 Pa. 7; Davey v. Puffell, 162 Pa. 443; Miller v. Baker, 166 Pa. 414. When, then, seven years after the conveyance to Rudolph, the judgment was recovered against him. the trust in favor of his wife continued to be available to her, as fully as before.

It is, however, a well established doctrine that such a trust ceases to be assertable when the legal title has passed for value to one who had no notice of it. On the judgment against Rudolph there has been a sheriff's sale, at which Samuel Smock became the purchaser. Did he have notice of the equitable title of Sarah Rudolph?

Record title of Mrs. Rudolph's interest Smock had not. There was no deed to her. No such deed could therefore be recorded. The deed that was recorded indicated that the land was her husband's. Of actual notice of Mrs. Rudolph's interest at the sheriff's sale, there is no suggestion in the evidence. No constructive notice, *i. e.*, no facts which might be treated as equivalents of notice, is revealed, other than the possession of Mrs. Rudolph, before, at, and after the sheriff's sale. Had she been in sole possession, there can be no question that it would have been incumbent on Smock, before purchasing the land, either to inquire of her as to the title under which she claimed, or to submit to it, whatever it might be, if otherwise valid.—Jaques v. Weeks, 7 W. 276; Hottenstein v. Lerch, 104 Pa. 454; Anderson v. Brinser, 129 Pa. 376; Rowe v. Ream, 105 Pa. 543.

Had the deed on record been to another than Mr. Rudolph, it is also certain that Mrs. Rudolph's possession, though in conjunction with her husband, would have been constructive notice to Smock of her equitable title. Sill v. Swackhammer, 103 Pa. 7; Jamison v. Dimock, 95 Pa. 52; Brown v. Carey, 149 Pa. 134. The precise question we are to determine is, whether, the recorded deed being to John Rudolph, and he, with his

wife, being in apparent possession, there was any duty upon Smock to inquire of him or of her as to the right under which they had the possession.

Why should the fact that the recorded deed was to John Rudolph preclude him from defending on some other title than grantee, if he had any? The deed, it is true, would account for his possession, and there are cases which intimate that when this is so the purchaser need suspect no other title than the deed.—Lance v. Gorman, 136 Pa 200: Plumer v. Robertson, 6 S. & R. 179; Woods v. Farmere, 7 W. 382; Dickinson v. Beyer, 87 Pa. 274. On the other hand, it is held that if one is in possession under a lease, his possession is constructive notice of any other title he may have, even to a purchaser who was aware of the lease and assumed that it was the full explanation of the possession, Anderson v. Brinser, 129 Pa. 376, repudiating a dictum to the contrary in Leach v. Ansbacher, 55 Pa. 85; *Cf.* also Daniels v. Davison, 16 Ves. 249, cited in Hottenstein v. Lerch, 104 Pa. 454. It may be, though this is doubtful, that as John Rudolph has put a deed to himself in fee simple on record, Smock was under no duty to suspect that he was in possession, not as grantee, but by the permission of his wife, and under her right.

But is Mrs. Rudolph precluded from insisting that she being in possession, it was Smock's duty to inquire after any title which she had? There are dicta to the effect that the possession of the wife along with her husband is notice of her title only when there is no deed to the husband inconsistent with that title. Thus McCullom J. says, in Brown v. Carey, 149 Pa. 134, "The possession of Mrs. Carey was consistent with her title [by a resulting trust] and sufficient in the absence of a recorded title in her husband inconsistent with it, to put a purchaser on inquiry."

If it appeared that Sarah Rudolph knew that the conveyance had been to her husband and nevertheless caused the deed to be recorded, or assented to its being recorded, it might be proper to hold her no less bound by the implied representation as to the explanation of her possession than he would be as to the explanation of his. But it is distinctly shown that she had not this knowledge, nor caused the recording of the deed. Nor are we able to adopt the rule that she shall be estopped, by reason of the lapse of six years since the deed was made, to deny her knowledge and causation. Wives may own lands, as well as husbands, and they may be in possession of these lands with their husbands. It is no hardship to require intending purchasers to suspect in any case that the wife may be the owner, and therefore to make inquiry of her or to take the risk. "In this State since 1848," observes Green, J., "married women are the owners in their own right of real estate held by them before marriage or acquired by gift or purchase after marriage, and it is not infrequent that husbands live with their wives upon the land of the latter." Of these facts it is not too much to expect purchasers to have knowledge, and to require them, before venturing on the purchase, to investigate upon the premises the possible and not very improbable title of the wife. It was not necessary for Smock to buy this land and buying it, we think he must be held to have taken the risk of the ownership of the person as whose he bought it. *Cf.* Jackson v. McFadden, 4 W. N. C. 539.

Over five years have elapsed since the resulting trust came into existence by the conveyance to John Rudolph. It is well settled, however, that the act of April 22, 1856 does not apply, so long as the *cestui que trust* is in possession.—Miller v. Baker, 160 Pa. 172; 166 Pa. 414; Clinger v. Shultz, 183 Pa. 469; Light v. Zeller, 144 Pa. 582.

Your verdict, therefore, gentlemen of the jury, if you find the facts to be as assumed in our previous remarks to you, should be for the plaintiff.

JOHN RUSKIN vs. HERBERT SPENCER.

Possession as between co-tenants—Power o one to lease.

STATEMENT OF THE CASE.

Spencer and Williams as tenants in common owned a tract of oil land. Williams in Spencer's absence and without his knowledge, made a lease of the land for fifteen years to Ruskin, reserving a royalty of twenty-five cents per barrel on all of the oil taken out. Ruskin took possession and

began and continued for five years the business of obtaining oil—paying in the meantime the royalty amounting to $3,000 to Williams. Spencer then coming to the neighborhood and finding Ruskin temporarily absent took possession of the land, and by a show of force, prevented Ruskin's re-entering on it. The operations were therefore suspended by Ruskin and he was deprived of his machinery and improvements worth $2,000.

Trespass for damages.

HOLCOMB and HEIST for the plaintiff.

One co-tenant in common, unless empowered by the other co-tenant, cannot execute a lease which will be binding on his fellow co-tenant. McKinley v. Peters, 111 Pa. 283; Painter v. Cole, 120 Mass. 162. Such a lease is binding only on the party executing it. McKinley v. Peters, 111 Pa. 283; Vandyke's Appeal, 57 Pa. 9. As against the co-tenant it is voidable, McKinley v. Peters, supra; Graves v. Hodges, 55 Pa. 516. Ruskin by the lease became a co-tenant with Spencer, and he, therefore, has a right of ejectment against Spencer for one-half the profits. McGee v. Ash, 7 Pa. 397; Filbert v. Hoff, 42 Pa. 97; Bennett v. Bullock, 35 Pa. 364; Critchfield v. Humbert, 39 Pa. 427; Trauger v. Sassaman, 14 Pa. 514. By the same reasoning Ruskin can recover either as his own property or regarded as fixtures.

KENNEDY and FRANK for defendant.

One tenant in common cannot bind the land by lease. McKinley v. Peters, 111 Pa. 283; Painter v. Cole, 120 Mass. 152; Vandyke's Appeal, 57 Pa. 9. Therefore, Ruskin was a trespasser and Spencer had a right to eject him from the land.

OPINION OF THE COURT.

The lessee of one tenant in common is lawfully in possession of the whole tract demised, for the lessor's possession is *per mie et per tout:* Baker v. Lewis, 150 Pa. 251; such lessee on entry has the same rights in relation to the other co-tenants as the lessor before the demise, even though such lease was made against the will and without the authority of the other co-tenants: Keay v. Goodwin, 16 Mass. 1; Lessee of Simpson v. Ammons, 1 Binn. 175. Says Agnew J., in Hayden v. Patterson, 51 Pa. 261, "But there is nothing to prevent a tenant in common in possession from letting out his share of the common property and receiving rent for it."

We think that the case of McGill v. Ash, 7 Pa. 397, rules the case at bar. McGill had rented the *locus in quo* to Mrs. Smith for a tavern, one-fifth of which premises had been recovered in ejectment by Ash who had been put into possession as a tenant in common by the sheriff. Mrs. Smith at the instigation of McGill threw out Ash and his goods. The court held, "that a tenant in common may maintain trespass (against his co-tenant) for an injury done to his possession, because that possession is not confined to any particular part of the premises but is commensurate with the whole in relation to which he has the right to an exclusive possession except as against his co-tenant, and the measure of damages will be regulated by the extent of his interest." The gist of the action was the dispossession of the plaintiff; throwing out him and his goods was wrong only in the light of his right to the possession of the *locus in quo*. Says Thayer, P. J., in Norris v. Gould, 15 W. N. C. 187, "But it is still the law that one tenant in common can sustain trespass against his co-tenant only in case of an unequivocal ouster from his right of entry and possession."

Says Harrison, J., in Winterburn v. Chambers, 91 Cal. 170, "An ouster of one co-tenant by another is produced by acts of the same character as will produce any other ouster. In either case it is the wrongful dispossession or exclusion of a party from real property who is entitled to the possession. In each case the same kind of possession is required and must be taken and held with the same hostile intent. * * * In the case of the co-tenant, however, the intent with which the possession is taken is not manifested by the mere fact of possession, but must be established either by actual notice or by acts or declarations so open and notorious, and of such a nature that it may readily be presumed that the co-tenant out of possession is informed thereby of the hostile intent with which the possession is held. It is the intent which determines the character of the possession; but it is essential that this intent be in some mode either by actual or presumptive notice, directly or indirectly communicated to the other co-tenant. This intent is not the secret purpose of the occupant but is the purpose which the acts themselves manifest, and the acts done must be manifested to the person against whom the ouster is di-

rected." The ouster must be proved by decisive acts of a hostile character: Watson v. Gregg, 10 Watts 289. In Trauger v. Sassaman, 14 Pa. 514, the defendants built a wall which effectually excluded the co-tenants from placing their carriages or hitching their horses in the *locus in quo;* the court held that such act constituted an ouster for which trespass may be maintained. There may be an ouster of a portion of the land held in common: Bennett v. Clemence, 6 Allen 10; Carpenter v. Webster, 27 Cal. 524. "No real force, as a turning out by the shoulders is necessary. If upon demand by the co-tenant the other denies his right and continues in possession such possession is adverse and an ouster enough;" Doe v. Prosser, 1 Cowp. 217; Carpenter v. Webster, 27 Cal. 524; Gordon v. Pearson, 1 Mass. 328. No attempt need be made to re-enter in the face of threats: People v. Rickert, 8 Cow. 232. In the case at bar the defendant "prevented" the plaintiff from re-entering; such prevention accompanied with "a show of force" clearly shows a hostile intent, and constitutes an actual ouster.

What shall be the measure of damages? In Bare v. Hoffman, 79 Pa. 71, the defendant diverted by a large pipe the water of a water course from the premises of the plaintiff. The court held that it was not to be presumed that such tort would continue through all coming time; that for any continued obstruction of the right the plaintiff could sustain successive actions; in each case he could recover the damages he had sustained subsequently to the last preceding action; that the damages recoverable are limited to those already suffered at the commencement of the suit. See also: Uline v. Railroad Co., 101 N. Y. 98. The plaintiff should recover a fair rental value of the oil land to the extent of his interest (presumably half), plus a fair rental value of the machinery (all of which is his own) for the whole time he has been deprived of the possession. Has this been a day or ten years? We cannot permit the jury to guess: Irwin v. Nolde, 164 Pa. 205. The loss is pecuniary and can be measured; there is no evidence to show the extent of time the plaintiff has been deprived of the possession; nominal damages only can be allowed: Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26; McHugh v. Schlosser, 159 Pa. 480.

The jury are therefore directed to find a verdict for the plaintiff against the defendant in the sum of six cents and costs.

WARREN L. SHIPMAN, J.

OPINION OF THE COURT.

That Williams in the absence of some special authority had no power to bind Spencer by the agreement to lease their land to the plaintiff is apparent; McKinley v. Peters, 111 Pa. 283.

But on the other hand, being in possession, he clearly had the right to lease his own share of the common property. Hayden v. Patterson, 51 Pa. 261, and notwithstanding the fact that Williams had no authority to bind Spencer we do not think the lease is void, but that it is valid as against Williams, and conveyed his interest to Ruskin, see Vandyke's Appeal, 57 Pa. 9; Grove v. Hodges, 55 Pa. 504. As the lease conveyed Williams' interest, and he had the right to possession, it is self evident that his lessee acquired the same right. Ruskin was therefore lawfully in possession of the whole land.

The case of McKinley v. Peters, supra, relied on by counsel for the defendant, is to be distinguished from this one in important particulars. In that case the action was in assumpsit and against *both* co-tenants, and while it clearly supports the proposition that *both* co-tenants cannot be held when the co-tenant who neither ratified or authorized the making of the lease enters and takes possession of the land, yet we are of the opinion that had the action been in trespass and only against the co-tenant who made the entry the plaintiff would have been entitled to recover. The case of Baker v. Lewis, 150 Pa. 251, is authority for the statement that the defendant committed a trespass by taking possession of the land, and preventing the plaintiff from re-entering, and also that Spencer's remedy is an action for mesne profits or for the use and occupation of the land.

We are of the opinion that that case rules this one and on the authority of it we enter judgment for the plaintiff in the sum of $2,000, or the amount of damage caused by the defendant's entering and retaining the possession of the land.

Judgment for plaintiff.

W. ALFRED VALENTINE, J.

JOHN ADAMS vs. FARMER'S BANK.

Duty of collecting bank.

STATEMENT OF THE CASE.

Adams received a check drawn by John Coe on the Merchants' Bank for $1000, and endorsed it to the Farmers' Bank for collection. The Farmers' Bank sent it to the Merchants' and surrendered it, receiving the check of the cashier of the latter bank in payment. The Merchants' Bank instantly charged the check against Coe's account. The next day it failed, closing its doors. The Farmers' Bank then charging the amount of the check against the deposit account of Adams, which it had previously credited with the same amount, Adams brings this assumpsit.

O'KEEFE and RYAN for the plaintiff.

By accepting anything else than cash, the defendant became liable.—3 Am. & Eng. Ency. (2nd Ed.) p. 804; Hazlett v. Comm. Natl. Bank, 132 Pa. 118; Pitts. Fifth Natl. v. Ashworth, 123 Pa. 212; Merchants' Natl. Bank v. Goodman. 109 Pa. 422; McCulloch v. McKee, 16 Pa. 289.

SEBRING and SLOAN for the defendant.

When a bank credits a depositor with a check left for collection, and the check is found to be worthless, the amount may be charged back.—Rapp v. Natl. Bank of Phila., 136 Pa. 426. Money paid on a worthless check can be recovered.—89 N. Y. 419; Clews v. Bank of Natl. Banking Asso., 59 N. Y. 67.

OPINION OF THE COURT.

The Farmers' Bank received the check of Coe from Adams, the plaintiff, and credited the account of the latter with the same. It presented this check to the bank on which it was drawn and took the cashier's check of the latter instead of the cash for the same. The Farmers' Bank was bound to return to Adams the money or the check. It did neither, but saw fit to give credit to the drawee by accepting its obligation for the same.

"As between the defendant and the depositor this amounted to payment."—5 Natl. Bk. v. Ashworth, 123 Pa. 319.

That Coe had a sufficient balance to his credit to pay the check is not contended for. It was charged to his account when presented without a question. Besides, the dealings between him and his depository is not a matter to be inquired into in the present case.

The plaintiff is therefore entitled to recover.

NATHAN ORRIS vs. WM. JAMES.

Payment—Check.

STATEMENT OF THE CASE.

On Jan. 1, 1900, Wm. James gave to Nathan Orris a check for $1,000 payable at the Carlisle Bank in satisfaction of a debt due by him for lumber. He had in the bank $1,100. On Jan. 5, Orris went to the bank to procure the money, but one hour before it had closed its doors. The bank is insolvent and depositors will lose everything. Orris now sues on the bill for lumber amounting to $1,000.

LAUER and BRENNAN for the plaintiff.

1. A check does not discharge a debt until it has been paid. McIntyre v. Kennedy, Childs & Co., 29 Pa. 448; Hart v. Ballas, 15 S. &. R. 162; Weakley v. Bell, 9 Watts. 273; Hays v. McClury, 4 Watts. 452.

ELMES and WANNER for the defendant.

1. The holder of a check, in order to charge the drawer in case of a dishonor, must present the check for payment within a reasonable time. If drawer resides in the town where the bank is located forty-eight hours is the extent of such reasonable time. National Bank v. Weil, 141 Pa. 457; Fegley v. McDonald, 89 Pa. 128; Case v. Morris, 31 Pa. 100.

OPINION OF THE COURT.

James' check was given to Orris in satisfaction of a debt for lumber. Had it, however, on due presentment to the bank not been paid, then Orris would have had a right to payment in some other mode. He received the check on Jan. 1, 1900. On Jan. 5, he went to the bank to procure the money and found that one hour before it had closed its doors. Had he gone on the 2nd, 3rd or 4th of January, he would have been paid.

When James gave the check it was his duty to leave its amount on deposit in the bank. His hands were thus tied with respect to withdrawing it. It was Orris's duty to avoid unnecessary delay in presenting the check. The delay of four days is *prima facie* unreasonable, and has not been explained. It would be unjust to

transfer the resulting loss from Orris to James. This result can be avoided, only by holding the check under the circumstances, a payment of the debt. National Bank v. Weil, 141 Pa. 457.

On the case stated, judgment for the defendant.

JONES' ESTATE.

Seal—Consideration—Evidence.

STATEMENT OF THE CASE.

On August 11, 1894, Adam Coover borrowed $1,000 from John Stope, giving the latter his bond.

There were two printed seals on the bond, Coover's name being placed on a line midway between the two.

The bond not being paid, Stope agreed with Coover not to sue if he would get security, and for this purpose gave him the bond (taking a receipt for it).

Coover asked Jones to become security, and Jones put his name on the bond below that of Coover and slightly below the extension of the lower line of the lower seal.

There was no evidence as to Jones' intention to adopt this seal.

January, 1897, Jones died, and Stope not being paid, presented his bond at the distribution of the estate of Jones.

COBLENTZ and PIPER for the plaintiff.

1. From the facts it is to be presumed that Jones adopted the seal as his own.—Bowman v. Robb, 6 Pa. 302; Hess' Est., 150 Pa. 346.

2. Consideration is implied from the seal. Grubb v. Willis, 11 S. & R. 187. Forbearance to sue is a sufficient consideration.—Carmen v. Noble, 9 Pa. 366; Bailey v. Marshall, 174 Pa. 602.

SLOAN and TAYLOR, W., for the defendant.

1. A seal will not be presumed to have been adopted unless there is clear evidence. Bowman v. Robb, 6 Pa. 302; Rhoades v. Templeton, 4 Forum, 106.

2. There was no consideration to support Jones' promise to pay.—Hess' Est., 150 Pa. 346; Rhoads v. Templeton, 4 Forum, 106.

OPINION OF THE COURT.

Objection was made before the auditor to the claim of John Stope against this estate, on the ground that the engagement of Jones as surety on Coover's bond is without consideration and is not under seal. We think that the objection is not supported by the evidence. In the first place, it appears that there were two printed seals upon the instrument; that Coover signed on a line midway between the two, and that Jones signed slightly below the extension of the lower line of the second seal. Whether Jones intended to adopt the second printed seal is a question of fact, and we are unable to say that the auditor had no right to infer that it was his intention so to do. Indeed, we believe the evidence ample to justify such a conclusion. In Bowman v. Robb, 6 Pa. 302, where there was the written obligation of two parties, concluding with the words "Witness our hands and seals," but only one seal, which was affixed to the name of the party first signing, the court held that the obligation on its face furnished intrinsic evidence for the jury that the party last signing it had adopted the seal as it stood upon the paper. The evidence of adoption seems to be at least as strong in the case at bar as in the case just mentioned. It is true that in this case the words "witness our hands and seals" are not contained in the instrument, but on the other hand there are two seals here while in Bowman v. Robb there was but one. The fact that the signatures were slightly below the respective seals, we regard as of little moment.

The case of Hess' Estate, 150 Pa. 346, may readily be distinguished. There it appeared that there were two signatures, only one seal, and a reference in the body of the bond to only one seal. From such facts, the inference was clear that one of the signatures was not under seal, and the auditor so found.

The engagement of Jones being under seal, the claim is enforceable, though without actual consideration. If it were to be considered, however, that Jones did not adopt the printed seal, we are of the opinion that the agreement of Stope with Coover, to forbear from bringing suit upon the bond, was a consideration sufficient to support Jones' engagement. Mere forbearance, it has been held, is not a consideration for such an engagement, but an agreement to forbear, like a definite extension of time, is unquestionably sufficient.—McNaught v. McClaughey, 42 N. Y. 24; Mecorney v. Stanley, 8 Cush. (Mass.) 85.

The decree confirming the report of the auditor is affirmed.

PHILIP AMES vs. AETNA INSURANCE COMPANY.

Insurance Policy.

STATEMENT OF THE CASE.

On Sept. 3, 1899, Ames took out a policy on his house in Mechanicsburg, for $3,500. The application and policy described the house as a tenement now in the occupancy of James Styles. Styles' lease expired Feb. 11, 1900, when he moved away and the house remained without a tenant until on Feb. 27th it was burned down by an incendiary. The policy contained the stipulation that "if the premises shall be applied to any other use than the present without the consent of the company expressed in writing this policy shall become void." It also stated that, "if by any change of the use of the building the risk of fire shall be increased, this policy shall be void unless the previous written consent of the company shall have been procured therefor." The company had not been notified of the vacancy of the house. Ames had made no serious effort to procure a tenant after Styles' removal. Plaintiff non suited—motion to take off.

HOLCOMB and ROTHERMEL for the plaintiff.

1. Insurance policies are interpreted strictly, and the present policy contains no stipulation against non-occupancy. Gamwell v. Ins. Co., 12 Cush. 167; Land v. Ins. Co., 2 Gray 222; Hall v. Ins. Co., 6 Gray 187.

LAVENS and JOHNSTON for the defendant.

1. Non-occupancy was, in the terms of the policy, such "change of the use of the building" as to increase risk of fire. A. & E. Enc., Vol. 7, 1032; Cornish v. Ins. Co., 51 N. Y. 318; Ins. Co. v. Ins. Co., 1 Gray 426.

OPINION OF THE COURT.

The defendant Company insured the house of the plaintiff. It was stipulated in the policy that "if the premises shall be applied to any other use than the present without the consent of the Company expressed in writing, this policy shall become void," and also that, "if by any change of the use of the building the risk of fire shall be increased, this policy shall be void unless the previous written consent of the Company shall have been procured therefor."

It does not appear that the policy was to become void by reason of non-occupancy. The vacancy for the period of eighteen days caused by the removal of the tenant cannot be held to be the application of the premises "to any other use" in the sense in which that term was used in the policy. It must be interpreted that a reasonable and ordinary use of the property insured was intended, having regard to its nature and the circumstances likely to occur. A vacancy was one of these and must have been in contemplation. Nor can it be held as a matter of law that the risk was thereby increased.

"The question whether the change of circumstances in the situation, use or condition of the party increases the risk is surely one of fact for the jury." Wood on Fire Insurance, 439.

"Vacancy or non-tenancy of the premises will not of itself be held to constitute a material increase of risk." A. & E. Ency. of Law, vol. 7, page 1036; Luce v. Dorchester Mutual Ins. Co., 105 Mass. 397.

In Gamwell v. Ins. Co., 12 Cush. 167, the property was vacated for fifty-three days, yet the court held it was for the jury to determine if there had been any material increase in the risk.

In O'Neill v. Ins. Co., 3 Comstock 122, the premises were described in the policy as "occupied by a certain individual, as a private residence," yet it was there held "that this did not amount to a warranty of the continuance of the occupation during the risk, and therefore the insurers were liable, although before loss the occupant had removed and left the premises vacant."

The policy in the present case did not provide that it should become void in case of non-occupancy of the house. The case should therefore have been submitted to the jury and the nonsuit is taken off.

PETER HOLMES vs. PA. R. R. CO.

Negligence—Railroad crossings.

STATEMENT OF THE CASE.

Holmes was driving his team along the public highway and in attempting to cross the tracks of the defendant company was injured by being run into by a train on defendant's road. The train was going at

the rate of 60 miles an hour. The track near the crossing was so curved that approaching trains could not be seen. Holmes stopped, looked and listened, but could see or hear nothing of the approaching train. A bell was rung which could be heard 70 yards. A whistle could have been heard eight times that distance. The place at crossing is rural, only three houses in one-third of a mile in either direction. Court non-suited the plaintiff on the ground of no negligence. This is a motion to take off the non-suit.

JOHNSTON and LAVENS for the plaintiff.

1. The question of negligence must go to the jury.—7 P. F. S. 174.

2. The highest degree of care is required at dangerous crossings, Ellis v. R. R., 138 Pa. 519; and the ringing of the bell in the case of train running at a high speed is not a proper substitute for a steam whistle.—Longnecker v. R. R., 105 Pa. 328.

HEIST and KERN for the defendant.

1. There is no evidence of negligence and the court was not in error in non-suiting, for it is not negligence (a) to run trains at high speed in rural districts.—Childs v. R. R., 150 Pa. 73; R. R. v. Ritchie, 102 Pa. 425. (b) Proper warning is required on approaching crossings, and ringing the bell is proper warning.—R. R. v. Hogan, 47 Pa. 244; R. R. v. Stinger, 78 Pa. 219; R. R. v. Killips, 88 Pa. 405; Childs v. R. R., 150 Pa. 73.

OPINION OF THE COURT.

That the crossing on which the plaintiff was injured was most dangerous, as well as the fact that the train was running at a very high rate of speed was shown on the trial. On the other hand it was located in the open country. While the rate of speed was not therefore negligence on the part of the Railroad Company *per se*, yet a high degree of care to prevent accidents was incumbent upon it, owing to the location. Ellis v. R. R. Co., 138 Pa. 519; P. W. & B. R. R. Co. v. Stinger, 78 Pa. 219. "What is reasonable and proper warning is dependent upon the circumstances of the case."—Childs v. R. R. Co., 150 Pa. 73.

"Under the circumstances, it was the duty of the Court to submit to the jury the question whether the defendant had been guilty of negligence or not."—P. & R. Co. v. Killips, 88 Pa. 405; Childs v. R. R. Co., 150 Pa. 73.

There was therefore error in entering a non-suit and the motion to take off the same must be allowed.

AMOS KING vs. JACOB KOENIG.

Collateral security—Negligence.

STATEMENT OF THE CASE.

Koenig being indebted on book account to King in $237.12, assigned to King a note for $250 payable to him, Koenig, by one Adam Farnham. This note fell due twenty days after it was assigned. The assignment did not mention that it was as collateral security, but in form was absolute. When the note became due, King informed Farnham that he held it and demanded payment. Farnham paid $50 on account and agreed that he would wait three months for the balance, for $10 paid him in addition to the $50, and at the same time. At the expiration of the three months, the note not being paid, and Farnham having absconded, deeply insolvent, King demanded payment from Koenig, who refused. This assumpsit was then brought.

DRUMHELLER and DAVIS for the plaintiff.

1. The assignment of the note was as collateral security and not as payment. Jones v. Johnson, 3 W. & S. 276; Leas v. James, 10 S. & R. 314; Ely v. Hoopes, 1 Penny. 175; Hunter v. Moore, 98 Penn. 15; Seltzer v. Coleman, 32 Penn. 494.

2. The fact that no mention was made in the assignment as to its being collateral security is not conclusive. Bolles on Neg. Instruments, 184.

3. The endorsee did not release the endorser from liability by agreeing to extend the time of payment by maker for a consideration. Hagey v. Hill, 75 Penn. 108.

MOORE and BORYER for the defendant.

1. The holder of a note as collateral security is bound to employ reasonable diligence in its collection and a conversion of it into a less security is such misuse as makes him responsible to original debtor. Muirhead v. Kirkpatrick, 21 Pa. 237; Hanna v. Holton, 78 Pa. 334; Bast v. Bank, 101 U. S. 93; Lyon v. Huntingdon Bank, 12 S. & R. 61.

OPINION OF THE COURT.

Gentlemen of the Jury:

The note which Koenig, the defendant, assigned to King being the note of a third party for a different sum than the amount due the plaintiff from the defendant, and for a precedent debt, the presumption is that it was intended as collateral security—as conditional payment, that is, to be a

satisfaction if and when paid—and not as an immediate and absolute discharge.—McIntyre v. Kennedy, Childs & Co., 29 Pa. 451-53; Jones v. Johnson, 3 W. & S. 276; Eby v. Hoopes, 1 Penny. 175, and the defendant having produced no evidence which would warrant you in finding that the parties had a contrary intention, that presumption must prevail, hence the assignment of the note to the plaintiff did not extinguish the defendant's liability on the book account.

But it has been decided that when collaterals are placed in the hands of the creditor, and are not collected because of lack of due diligence on the creditor's part, that the debt will be regarded as extinguished. Bank of U. S. v. Peabody, 20 Pa. 454; Sellers & Nicholas v. Jones, 22 Pa. 423; Kilpatrick v. B. & L. Association, 119 Pa. 30; Holmes v. Briggs, 131 Pa. 233; Hanna v. Holton, 78 Pa. 334, and this the defendant contends is what has happened in this case; that the plaintiff by agreeing with Farnham that he would wait an extra 3 months for the payment of the remainder of the money did not use the proper degree of care. This, gentlemen, is a question for you. If you determine that the plaintiff did use reasonable care in entering into this agreement with Farnham, your verdict should be for him. If, on the other hand, you decide that he did not use the same degree of care which a reasonably prudent man would have used under like circumstances, your verdict should be for the defendant.

The plaintiff does not appear to demand interest. We have not been furnished with dates and are therefore unable to compute it, but in case you should find for the plaintiff, the amount of your verdict should be $187.12 or the amount of the book account less the $50 paid by Farnham to the plaintiff.

VALENTINE, J.

Gentlemen of the Jury:

Was the transfer of the note by Koenig to King to be an absolute payment of the debt or was it given merely as collateral security? To render the assignment a complete satisfaction there must be a specific intention of the parties to so consider it and in the absence of this intention the presumption of the law is, that the assignment was collateral security: and it is incumbent on the defendant to overcome this.

And no intention that it was to be absolute payment can be drawn from the writing itself, simply because it did not expressly state that it was collateral, or because it was absolute in form. Eby v. Hoopes, 1 Penny. 175. Again the assigned note was for a greater amount than the debt owed; it is held that a higher security will be presumed to be collateral; see Jones v. Johnson, 3 W. & S. 278.

"The mere acceptance from a debtor of the note of a third person in the case of an antecedent indebtedness is not a payment, and in the absence of a special agreement it must be considered as collateral security, and such acceptance is no bar to recovery from defendant for the original debt. The debtor continues liable in the event of a failure of payment of the note thus given or transferred." This law is explicitly stated in Hunter v. Moul, 98 Pa. 13; League v. Waring & Co., 85 Pa. 244; 2 Parsons on Bills 184.

But the defendant contends that the plaintiff was negligent in collecting by extending the time of the note three months. Now whether the plaintiff was so negligent or whether he was not; whether the amount of the note was lost through lack of diligence such as an ordinarily prudent business man under like circumstances would exercise, or whether there was no such want of diligence are for your consideration, gentlemen of the jury. They are questions of fact with which we have nothing to do; but if you want to find that, for want of such care on the part of the plaintiff, the note was lost, your verdict must be for the defendant; for if the plaintiff received the note as collateral security he was bound to use such diligence as the ordinarily prudent business man would exhibit in such a case and if he did not and the note was lost he cannot recover. Sellers & McNichols v. Jones, 22 Pa. 423; Kilpatrick v. B. & L. Association, 119 Pa. 30; Holmes & Son v. Drumm, 131 Pa. 233; on the other hand if you find that the plaintiff did exercise due diligence and that the note was not lost through any lack of foresight or want of care, the plaintiff is entitled to recover in the action

brought and you will render a verdict accordingly.

M. J. RYAN, J.

OPINION OF THE SUPERIOR COURT.

If the Farnham note was unconditionally accepted by King in payment of Koenig's debt to him, King can have no recourse to Koenig, simply because that note has not been paid. On the other hand, if it was accepted as conditional payment, or as collateral security, recourse to Koenig is not *ipso facto* precluded. It might have been shown that King received the Farnham note in payment, but it was not. In the absence of evidence of intention, it must be presumed that that note was given to King as collateral security or as a conditional payment. Hunter v. Moul, 98 Pa. 13; McCartney v. Kipp, 171 Pa. 644; Holmes v. Briggs, 131 Pa. 233; and the court below has rightly held that suit on the book account was not rendered impossible by reason of the assignment of that note.

But the Farnham note has not been collected and cannot now be collected because of his insolvency. It is suggested that the delay in collecting this note is the cause of the loss of it. The court below properly assumed that the mere non-payment of this note does not justify the refusal of a recovery by King against Koenig. The question is, whether that delay was the result of a want of due diligence. The delay lasted three months, but before the expiration of that period —how soon before does not appear—Farnham became insolvent. Under adequate instructions of the court, the jury found that no lack of due diligence was imputable to King.

There was an agreement between King and Farnham that the latter should have three months longer time in which to pay the note. Had this been a valid agreement we think it would have prevented recourse by King against Koenig. If King desired to maintain his right of action against Koenig, he should have preserved his ability to surrender the Farnham note to Koenig at any time, on Koenig's tendering payment to him, and to reinvest Koenig with his original rights on that note. But we do not find that there was any valid consideration for the agreement to delay. The $50 was a payment on account. Ten dollars were paid for the delay. But the law treats this as paid on account of the debt, and does not regard it as making the agreement for delay binding. Johnson v. Thomas, 2 Forum 115. Hence despite King's agreement with Farnham, he could have sued the latter at any time, and what he could have done, Koenig on paying King could have done.

Judgment affirmed.

JOHN ROTH vs. SAMUEL SAMES.

Statute of frauds—Conveyance of land—Specific performance.

STATEMENT OF THE CASE.

Sames, owning a lot, and no other, on W. Louther street, Carlisle, orally agreed to sell it to Henry Newcome for $400. Newcome paid down $100, and Sames gave a receipt as follows:

Carlisle, Aug. 11, '99.

Received of Henry Newcome $100 on account of price of lot on W. Louther street, Carlisle, viz., $400, a deed of which I am to make on the payment of the remaining $300.

It is shown that at the time of making this receipt, Sames gave a draft of a lot, showing W. Louther street and adjoiners on the east and west, but that Newcome has since lost this draft. Newcome sold the lot to Roth and informed Sames of the sale. Roth tendered the remaining $300 with interest from August 11, '99, and requested a deed. Sames, on Nov. 12, '99, refused to make the conveyance.

SHELLENBERGER and ROBITAILLE for the plaintiff.

The receipt is sufficient—The Act of 1772 requires only a writing showing that there is a contract.—Colt v. Selden, 5 Watts 528; Lowry v. Mehaffey, 10 Watts 389; Soles v. Hickman, 20 Pa. 180.

The description of lot in receipt is sufficient.—Ross v. Baker, 72 Pa. 186; Smith's Appeal, 69 Pa. 474.

YEAGER and TAYLOR for the defendant.

A receipt in part payment by which the terms of the contract are not defined is not enough to take the transaction out of the Statute of Frauds.—Soles v. Hickman, 20 Pa. 180; Irvin v. Bull, 4 Watts 287; Allen v. Allen, 45 Pa. 468.

OPINION OF THE COURT.

By an Act approved March 21, 1872, known as the "Statute of Frauds," it is

provided in substance that "no estate in lands excepting leases for three years shall be assigned, granted or surrendered unless it be by deed or note in writing signed by the parties so assigning, granting or surrendering the same, or their agents thereto lawfully authorized in writing or by act or operation of law."

The question in the present case is whether the receipt of Sames to Newcome is a substantial compliance with the Act of Assembly above referred to. In the receipt given by the former to the latter, the price to be paid is named and the portion received by the vendor at the time the same was executed. The borough and street of the same on which the same is located are also set forth. Besides, a draft was also given by the vendor to the vendee naming the adjoiners on the east and west, the street named running between these two points of the compass.

The Act of 1872 does not require the writing to be under seal.—Colt v. Selden, 5 W. 528.

"Any memorandum or writing indicative of the intent of the parties and so precise as to enable the inquirer to ascertain the terms of the contract, the land to be conveyed and the price to be paid for it is a sufficient contract in writing to be enforced specifically."—Appeal of McFarson 1 Jones 503.

A receipt which embraces these essentials is sufficient.—Lower v. Mehaffey, 10 Watts, 389; Ross v. Baker, 172 Pa. 186.

In Soles v. Hickman, 20 Pa. 190, cited by the defendant, no price was mentioned in the writing.

Newcome being entitled to enforce a conveyance of the lands against Sames his alienee, John Roth, the plaintiff, has a like right.—Rhodes v. Frick, 6 Watts 315.

The question intended to be raised in this case was whether under the Statute of Frauds the writing was such as would sustain an action against the defendant for specific performance, and the accident that the date named as the one on which the demand was made happened to be on Sunday is not material.

The defendant is therefore required to make a deed to the plaintiff and a formal decree to that effect will be prepared by his attorney.

FORUM BOARD.